IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 19TH JANUARY 2007 / 29TH PAUSHA 1928

OP.No. 16362 of 2000(W)

PETITIONERS:

1. M.P.THRESSIAMMA, W/O.LONAPPAN, ARANGASSERY HOUSE, ANCHERY, VALARKAVU, ANCHARY P.O., TRICHUR.

2. K.L.MARY, W/O.LONAPPAN, KOLANGARA HOUSE, MAVELI NAGAR, KURIACHIRA P.O., TRICHUR.

BY ADV. SRI.P.RAMAKRISHNAN
SMT.T.C.KRISHNA

RESPONDENTS:

1. APPELLATE AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT, (REGIONAL JOINT LABOUR COMMISSIONER), ERNAKULAM.

2. CONTROLLING AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT (DISTRICT LABOUR OFFICER), TRICHUR.

3. THE CANNING INDUSTRIES COCHIN LTD., REP. BY ITS MANAGING DIRECTOR, FACTORY, AND REGD. OFFICE, CAICO ROAD, TRICHUR-6.

4. MANAGING DIRECTOR, THE CANNING INDUSTRIES COCHIN LTD., FACTORY AND REGD OFFICE, CAICO ROAD, TRICHUR-6.

BY ADV. SRI.T.M.CHANDRAN
SRI.JOSHI VARGHESE

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 19.1.2007 THE COURT ON 19/01/2007 DELIVERED THE FOLLOWING:

O.P.NO.16362/2000.

APPENDIX

PETITIONER'S EXHIBITS:

P1. COPY OF THE THE ORDER OF R2 DTD.30.12.97.

P2. COPY OF THE ORDER OF R1 DTD.17.12.99.

Sdk+

///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

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O.P.No.16362 of 2000

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Dated this the 23rd day of January, 2007

J U D G M E N T

The petitioners are employees working under the third respondent company. The company is engaged in the business of processing fruits and vegetables. The petitioners retired from service after 29 and 31 years respectively. At the time of retirement, they were paid gratuity at the rate of 7 days' wages for every completed year of service. The petitioners filed application before the Controlling Authority under the Payment of Gratuity Act seeking balance of the gratuity payable at the rate of 15 days' wages per completed year of service. The third respondent took the contention that the factory of the third respondent is a seasonal establishment and therefore the rate of gratuity payable is only 7 days' wages per completed year of service. This argument found

favour with the Controlling Authority who calculated the gratuity at the rate of 7 days' per completed year of service but found that the gratuity paid to petitioners was short by Rs.2416/- and Rs.268/- respectively and directed the third respondent to pay that amount. The order of the Controlling Authority is Ext.P1. The petitioners herein filed appeals before the appellate authority, who by Ext.P2 common order, dismissed the appeals holding that the third respondent establishment is a seasonal establishment. Exts.P1 and P2 are under challenge in this original petition.

2. The contention of the petitioners is that the third respondent factory is not a seasonal factory and it works through out the year and therefore, they are entitled to 15 days' wages per completed year of service, as gratuity. On the other hand, the counsel for the third respondent would submit that the third respondent

establishment is a seasonal establishment and therefore, only 7 days' wages per completed year of service is payable as gratuity to the petitioners. He would also submit that the third respondent has been paying this gratuity at the rate of seven days' wages per year from 1947 onwards which is the year in which factory started functioning. He would further submit that the petitioners themselves, in their evidence, have categorically admitted that the third respondent's establishment is a seasonal establishment.

3. I have considered the rival contentions in detail.

4. The relevant provision regarding payment of gratuity and the rate thereof is contained in Section 4 of the Payment of Gratuity Act, 1972. Sub section 2 of Section 4 reads as follows:

> "(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:
>
> Provided that in the case of a piece-rated employee, daily wages shall be computed on the average

> of the total wages received by him for a period of three months immediately proceeding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:
>
> Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days' wages for each season."

Going by the above, the rate of 7 days' wages for each season is applicable to seasonal establishment. In this connection, I note that the Payment of Gratuity Act draws a distinction between a factory and an establishment. Under subsection 3 of Section 1 relating to the applicability of the Act reads as follows:

> "(3)It shall apply to---
>
> *(a)* every factory, mine, oilfield, plantation, port and railway company;
>
> *(b)* every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;
>
> *(c)* such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."

Clause (a) relates to factory, mine, oilfield, plantations, ports and railway company. Clauses *(b) & (c)* relate to "establishments". The word 'factory' is defined in Section 2(g) of the Payment of Gratuity Act, 1972, thus:

> "2. Definition:- In this act unless the context otherwise requires, -
>
> xx xx xx xx xx xx xx xx xx
>
> (g) "Factory" has the meaning assigned to it in clause (m) of Section 2 of the Factories Act, 1948 (63 of 1948);"

Th words 'shop' or 'establishment' are not defined in the Act. But in the Kerala Shops and Commercial Establishments Act, the words 'shop', 'establishment' and 'commercial establishment' are all defined in Sections 2(4), 2(8) and 2(15) as follows:

> "(4) "commercial establishment" means a commercial or industrial or trading or banking or insurance establishment, an establishment or administrative service in which the persons employed are mainly engaged in office work, hotel, restaurant, boarding or eating house, cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes such other establishment as the Government may, by notification in the Gazette, declare to be a commercial establishment for the purposes of this Act, but does not include a factory to which all or any of the provisions of the Factories

Act, 1948 (Central Act 63 of 1948) apply.

xx xx xx xx xx

(8) "establishment" means a shop or a commercial establishment.

xx xx xx xx xx

(15) "shop" means any premises where any trade or business is carried on or where services are rendered to customers, and includes offices, store rooms, godowns or warehouses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948 (Central Act 63 of 1948)."

In those definitions, factories are expressly excluded from their purview. I am of opinion that the two Acts being complementary beneficial legislations, those definitions can safely be looked into for the purpose of interpreting the meaning of the word "seasonal establishment" occurring in the payment of Gratuity Act in the absence of any specific definition for the same. In this context Subsection (3-A) Section 1 of the Payment of Gratuity Act is also worthmentioning, which reads thus:

"(3-A) A shop or establishment to which this Act

> has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten."

This section which occurs immediately after Section 3 relates only to shop and establishment and excludes factory which also adds support to my view that the legislature purposely intended to draw a distinction between factory and establishment in the matter of payment of gratuity. Looked in that perspective, I am of opinion that 'seasonal establishment' should be understood as not including seasonal factory. In the proviso to Section 4 only "seasonal establishment" is mentioned, not "seasonal factory". Therefore, an interpretation to the effect that the proviso to sub subsection 2 of Section 4 applies only to 'seasonal establishments' coming within sub clauses (b) and (c) of Sub section 3 of Section 1 of the Act and not factory, which comes within sub clause (a) thereof would not be out of place, in order to give effect to a beneficial legislation which the

Payment of Gratuity Act, 1972 is. In view of that interpretation I am of opinion that once it is a factory, the rate of gratuity payable is 15 days' wages per completed year of service irrespective of whether it is seasonal or not, and the reduced rate of 7 days per season is applicable only to seasonal establishments. In other words, even if the third respondent's factory is seasonal in functioning, the proviso to sub section 2 of Section 4 would not be attracted.

5. In the present case, in the written statement filed by the third respondent before the authorities under the Payment of Gratuity Act he has stated that his establishment is a seasonal establishment and gave evidence to the effect that as per the order of the Inspector of Factories and Boilers dated 16.5.1950, the 3rd respondent's establishment has been declared as a seasonal establishment. In order to prove the same, the third respondent has chosen to produce a

certificate issued by the Inspector, a copy of which has been produced in this original petition along with a memo dated 18.12.2006. That certificate states that the third respondent's establishment is registered as a factory under the Cochin Factories Act and the same is placed as item No. 178 as a seasonal factory on the register of factories maintained in the office of the Inspector of Factories and Boilers. That being so, I am of opinion that the third respondent cannot rely on the proviso to Sub section 2 of Section 4 to deny 15 days' wages per completed year of service as gratuity to the petitioners.

6. Assuming for argument's sake that for seasonal factories also this reduced rate of gratuity is applicable, even then, the third respondent has to prove that the third respondent's factory does not work through out the year. A Single judge of this Court had occasion to consider the scope of the words "seasonal

establishment" under the Payment of Gratuity Act in Consolidated Coffee Ltd. v. Uthaman reported in 1979 K.L.T.280, in which it has been held as follows:

> "5. A 'seasonal establishment' is not defined under the Payment of Gratuity Act. Nor is 'seasonal establishment' defined as such under the Employees' state Insurance Act or the Employees' Provident Funds Act, although under those two enactments a coffee curing factory, among others, is specifically mentioned as a seasonal establishment. The meaning of a seasonal establishment has therefore to be understood in the popular sense. Any factory which only works during certain seasons of the year, and not throughout the year, is a seasonal establishment.
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> 6. The second proviso to sub-section (2) of S.4 mentions a rate for each season during which a person is employed. If an employee is employed only in one season he would get gratuity at the rate of seven days' wages for that season. Likewise, if he has been employed for more than one season, he would get gratuity at that rate for each of those seasons.
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> 7. It would therefore appear that the rate has to be determined for the purpose of gratuity with reference to the period of employment of an employee in a particular establishment. An establishment may be seasonal insofar as its seasonal employees are concerned, but vis-a-vis persons working throughout the year it is a not a seasonal establishment. It has been found by the authorities that 36 employees work throughout the year in the factory whereas 160 employees work only during seasons. The factory is a seasonal establishment in respect of those persons who are employed seasonally, and it is a non-seasonal establishment in respect of the others who are engaged throughout the year."

7. The learned counsel for the third

respondent would submit that it is for the petitioners to prove that they have been working through out the year and therefore, they are entitled to full gratuity at the rate of 15 days' wages for every completed year of service. He would submit that they have not stated in their claim statement that they have been working so. I am not inclined to accept this contention. Under the Payment of Gratuity Act, pleadings have not much importance in so far as the Payment of Gratuity (Central) Rules, 1972 prescribes a form for application for gratuity as Form N. All what the petitioners can do is that to fill up that form and there is no question of adding anything to the same. Even otherwise, when the third respondent has all the evidence relating to the service particulars of the petitioners, the employer is in a better position to prove the attendance particulars of the petitioners than the petitioners. Therefore, when it is he who sets up a

case that his is a seasonal factory and the petitioners did not work through out the year, the burden of proof is on the third respondent to prove that his is a seasonal establishment/factory and the petitioners have worked as non seasonal workers as laid down in Uthaman's case (supra). The third respondent has not even made any attempt to produce any proof in that regard except to file a certificate to the effect that his is a seasonal factory. Going by the evidence narrated in Ext.P1, the 1st petitioner had stated before the Controlling Authority that there would be 12 months' work in the company and that the company had never been closed for want of raw materials, but of course in a cross examination she deposed that the work in the factory is that of processing mango and pineapple fruits which are seasonal fruits and that during those seasons all of them would work and after the season it would become difficult to give work to all of them. At that time, work would be

given to some of them. It is further stated that in respect of semi finished products for processing, the workers would he employed on rotation basis. Even if assuming that it is a seasonal factory, it was for the third respondent to prove that the petitioners herein had in fact worked only during the season and not beyond the season, which would have been very easy for the third respondent because they possess all the records to prove the number of days when the petitioners worked. Since the third respondent has not chosen to do so, I must draw an adverse inference against the third respondent especially since there is nothing to show that the petitioners had worked only during the season.

8. Further, according to me, going by common knowledge, at least mango has ceased to be a seasonal fruit at least for the last ten years because mango is available in the market through out the year. Further, the third respondent

himself in his written statement admits that his factory is engaged in the business of jam and pickles etc. I am satisfied that factories engaged in the manufacturing of jams and pickles work through out the year because some fruit or other, or vegetable is available through out the year for making jams and pickles. On that count I am not satisfied that the third respondent's factory is seasonal in nature.

9. In the above circumstance, I am satisfied that respondents 1 and 2 have went wrong in holding that since the third respondent factory is a seasonal one, the third respondent is liable to pay gratuity only at the rate of 7 days' wages per season. Accordingly, Exts.P1 and P2 are quashed. Consequently, there would be a direction to the 2nd respondent to take G.C. Nos.12/94 and 14/96 back to file and compute the gratuity payable to the petitioners at the rate of 15 days' wages per completed year of service and pass appropriate

orders directing the third respondent to pay gratuity to the petitioners accordingly. The original petition is allowed as above. In view of the facts that this matter is of the year 1996, and what remains is only to compute the gratuity at the rate of 15 days' wages for every completed year of service, the 2nd respondent shall dispose of the matter within one month from the date of receipt of a copy of this judgment.

Interlocutory applications stand closed.

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S.SIRI JAGAN, J.

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O.P.No.16326 of 2000

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23rd January, 2007